

87-1679
IN THE

SUPREME COURT OF THE UNITED STATES I L E D

OCTOBER TERM, 1988

NO. _____

Supreme Court U.S.

MAR 21 1988

JOSEPH F. SHANAHAN, JR.
CLERK

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FORTUNATO C. RIVERA,

PETITIONER,

v.

WILLIAM F. BOLGER, Postmaster General
UNITED STATES POSTAL SERVICE,

RESPONDENTS.

=====

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

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(111 PR)



QUESTIONS PRESENTED FOR REVIEW

1. Whether the cancellation of a Notice of Appeal to a statutory commission mistakenly taken out from an invalid agency decision operate to nullify the exhaustion of administrative remedies already undertaken on a second and continuing discrimination complaint where the first claim was initially included therein with the acquiescence of the agency?

2. Would the holding be different if there is a valid agency decision?

3. In either case, is a party bound to stay with the commission for 180 days as per 42 U.S.C. 2000e-16(c)?

4. Whether the Postal agency has met its burden of proof in justifying the repeated rejection of the petitioner for promotion over the years.

5. Whether the lower court erred in its findings of fact and conclusions

of law?

5. Whether a Federal District Court could ignor for any reason to pass judgment on a claim it has heard in a regular trial?

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- A - Decision Opinion of the Court of Appeals, 20 October 1987.
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- F - Plaintiff's Notice of Motion and Motion to Amend Findings of Fact and Judgment, dated 18 February 1986.
- G - Interpretive letter dated September 29, 1982, from the Director, Employee & Labor Relations, United States Post Office.
- H - Interpretive letter dated December 22, 1981, from the General Manager, EEO Appeals Division, USPS, Washington, D.C..
- I - Interpretive letter, plaintiff's Notice of Appeal, dated August 30, 1982.
- J - Interpretive letter, plaintiff's notice to the EEOC dated October 10, 1982, that he was suing in Court and therefore his Notice of Appeal be cancelled.
- K - Interpretive document, Part II The Profile Assessment System for Supervisors (PASS).
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- N - Interpretive USPS Qualification Standard 0160.
Proof of Service by mail.

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CERCUIT

The petitioner, Fortunato C. Rivera
(hereinafter Rivera), respectfully prays
that a writ of certiorari issue to review

the judgment of the United States Court of Appeals for the Ninth Circuit entered on 20 October 1987.

OPINION BELOW

The Court of Appeals entered its Opinion decision on 20 October 1987 affirming the lower court that Rivera's repeated rejection for promotion was for valid reasons and that his 1978 and 1979 claims for the position of EEO Investigator were barred for failure to exhaust administrative remedies. A copy of the opinion is attached as Appendix A.

The Court denied Rivera's petition for rehearing with suggestion for rehearing en banc on 11 January 1978. A copy of the Order is attached as Appendix B. His request to argue his case was not also granted.

JURISDICTION

The Opinion decision of the Court of Appeals was entered on 20 October 1987

and its Order denying Rivera's petition for rehearing and rejecting his suggestion for rehearing en banc was filed on 11 January 1988.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). No other petitioner is involved in this petition.

STATUTES, REGULATIONS AND CONSTITUTIONAL REGULATIONS INVOLVED

A. Title VII of the Civil Rights Act of 1964, as amended, 42 USCA 2000e-16, and the Age Discrimination in Employment Act (ADEA) of 1967, as amended, 29 USCA 633a, prohibit employers including Federal agencies to discriminate against their employees with respect to terms, conditions or privileges of employment because of their age, race, sex, or national origin, or because they have participated in an activity protected by law.

B. 29 Code of Federal Regulations -

1. Section 1613.215 on rejection
complaint:

"The head of the agency or his designee may reject a complaint which was not timely filed and shall reject those allegations in a complaint which are not within the purview of (Sec.) 1613.212 or which set forth identical matters as contained in a previous complaint which is pending in the agency or has been decided by the agency."

2. Section 1613.216(a) on investigation partly provides:

"The person assigned to investigate the complaint shall occupy a position in the agency which is not, directly or indirectly, under the jurisdiction of the head of that part of the agency in which the complaint arose."

3. Section 1613.221(a) - Decision
by head of agency or designee:

"The head of the agency, or his designee, shall make the decision of the agency on a complaint based on information in the complaint file. A person designated to make the decision for the head of the agency shall be one who is fair, impartial, and objective."

4. 1613.233(a) Re: Appeal to the
Commission. Time limit:

". . . . a complainant may file a

notice of appeal at any time up to 20 calendar days after receipt of the agency's notice of final decision on his or her complaint. . . . Any statement or brief in support of the appeal must be submitted to the Commission and to the defendant agency within 30 calendar days of filing the notice of appeal. For purposes of this Part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint."

5. Section 1613.281. Statutory

Right:

"An employee or applicant is authorized by Section 717(c) of the Civil Rights Act, as amended, 84 Stat. 112 to file a civil action in an appropriate United States district court:

- (a) Within Thirty (30) calendar days of the receipt of notice of final action taken by the agency on the complaint.
- (b) After one hundred and eighty (180) calendar days from the date of filing a complaint with the agency if there has been no decision.
- (c) Within thirty (30) calendar days after receipt of final action taken by the Commission on the complaint, or
- (d) After one hundred and eighty (180) calendar days from the date of filing an appeal with the Commission if there has been no Commission decision."

For purposes of this Part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint."

C. United States Constitution -

Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

There are two lower court decisions involved in this petition in two suits under Title VII of the Civil Rights Act of 1964, as amended, 42 USCA 2000e-16 and ADEA, as amended, 29 USCA 633a. Copies of the judgments, findings of fact and conclusions of law and Rivera's opposition papers are attached as Appendix C to C-28.

Rivera claims that he was discriminated against by the Postal agency over a long period of time because of his age (then "50 plus"), race (oriental brown), national origin (Filipino), and because he has filed complaints against his officials.

After a joint trial, the lower court

held that Rivera failed to exhaust his administrative remedies on his 1978 and 1979 claims for EEO Investigator.

Brown v. General Services Administra-
tion, 425 US 820, 12 FEP 1361 (1976).
42 USC 2000e-16(c); that he was less qualified than the applicants who were selected for a similar position in 1980; and that he failed to qualify for supervisor under the old system and PASS selection procedures from 1977 to 1980.

The court failed to pass upon Rivera's claims for supervisor under the Santa Ana Craft Skills Bank and Computer Mark-Up Supervisor selection procedures also in 1977-1980 although they were also tried with the other claims. The Court of Appeals ignored to pass judgment on the same claims:

The lower court ignored Rivera's position on "continuing discrimination" that affords him a remedy for past

discrimination, "disparate impact" and "subjective evaluation". Rich v. Martin Marietta Corp., 522 F. 2d 333, 348 (10th Cir. 1975); Reed v. Lockheed Aircraft Corp., 613 F. 2d 757, 759, 762 (9th Cir. 1980); Higgins v. State of Oklahoma, 25 FEP Cases 371, 372, (10th Cir. 1981); Patterson v. American Tobacco Co., C.A. Va. 1980, 634 F. 2d 744; etc. and Wang v. Hoffman, 694 F. 2d 1146 (9th Cir. 1982); Lee v. Conecuh County Board of Educ., Ala. 1981, 634 F. 2d 959; etc.

On appeal, the two cases were consolidated and the Court of Appeals affirmed the lower court. It held that Rivera's request to cancel his Notice of Appeal amounted to abandoning his claim, hence failing to exhaust his administrative remedies. Castro v. United States, 775 F. 2d 399, 403-404 (1st Cir 1985); Purtill v. Harris, 658 F. 2d 134 138 (3rd Cir. 1981); Jordan v. U.S.

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522 F. 2d 1128, 1132 (8th Cir. 1975).

Rivera who is challenging his employer's promotional policies, systems and practices, is a U.S. citizen of Filipino origin and is now 64 years of age. He is a holder of B.S. and M.A. degrees in Education and is also a Bachelor of Arts and Bachelor of Laws. He has been a part-time college instructor, an office supervisor and a government supervisor of private schools, among others. He joined the Postal Service in Santa Ana on June 16, 1976, as a casual clerk-carrier and became a permanent-career clerk on November 23, 1976. He has been working as such until the present time. He has earned three certificates in Postal Management and Customer Service and has met the requirement of the Western Regional PASS Training Program in effect in 1980. (Appendix D)

Rivera had consistently and was

repeatedly rejected for promotion to EEO Investigator in 1978, 1979 and 1980 and to supervisor from 1977 to 1980 under four different supervisory selection procedures in the same four-year period.

Rivera did not file a complaint after he was rejected for investigator in 1978 because he was encouraged by the agency to apply for future vacancies which he did in 1979 and 1980, but was also rejected. He filed his first complaint after his rejection in 1979. While this complaint was being processed by the Western Regional EEO Branch, the discriminating office against whom the complaint was filed, Rivera was again rejected for the 1980 vacancy. He then consolidated all his 1978, 1979 and 1980 claims into a single complaint and filed it with the same office on May 18, 1981, under the doctrine of "continuing discrimination". The same complaint was

accepted and no part of it was ever rejected as per 29 CFR 1613.215, supra.

On December 22, 1981, the headquarters EEO Appeals Division of the Postal Service in Washington, D.C., had determined that the EEO Branch had erroneously processed the said complaints. Accordingly, it immediately assumed jurisdiction over the two complaints. (Pls. see Appendix E. Ironically, the first complaint was decided on August 16, 1982, by the agency solely on the basis of the investigative report submitted by the EEO Branch, the discriminating office.

Rivera was then forced to file a Notice of Appeal with the Commission, but was never perfected with the required brief. On October 10, 1982, he requested for its cancellation after he had determined that the agency had not indeed rendered a final and appealable decision

and that he had already decided to sue in court. (See Appendix F & G).

After about sixteen (16) months since his second complaint was filed on May 18, 1981 and without the agency rendering its final decision or rejecting any part of it, Rivera sued in court on October 14, 1982, under the doctrine of "continuing discrimination".

In spite of this situation, the Commission rendered its unwanted decision on April 21, 1983, on the basis of the self-serving report submitted by the EEO Branch.

REASONS FOR GRANTING THE WRIT

1. Where a statutory regulation outlines an investigative and decisional rules to follow, mandatory compliance therewith is required. An administrative investigation and decision rendered not in conformity therewith do not resolve the issues and controversies in

the complaint. Hence, there is no final decision to speak of and no appeal could be taken thereon.

The reasons are very obvious. i. e. No Federal official will ever prepare an adverse report against his Office and no Federal agency will ever render an adverse decision against itself.

The statutory regulations (CFR, supra) have been designed to protect complainant-employees from unscrupulous discriminatory practices of their employers.

In view of the flagrant disregard or defiance of the said regulations in the handling of the complaint by the EEO Branch, the very office against whom it was filed, the Postal agency has not indeed rendered a final, binding and appealable decision on Rivera's 1979 complaint. Consequently, the Commission has never acquired jurisdiction over the

case. The least it could have done was to dismiss the case for the same cause.

Therefore, the complaint remained undecided by the agency after 180 days days from the date it was filed and therefore ripened for court action. So, it could have been futile for Rivera to have stayed with the Commission for 180 days before he sued in court.

II. The District Court's decision which was affirmed and further amplified by the Court of Appeals conflicts with all relevant prior judicial interpretation and application of the "continuing discrimination" doctrine in the exhaustion of administrative remedies.

It is a settled general rule of law that a Federal employee filing a Title VII and ADEA claims must first exhaust his administrative remedies before suing in court, otherwise his claim is barred by statute of limitations. Brown v. G.S.A.

42 USC 2000e-16(c), supra.

The doctrine of "continuing discrimination" is an exception to the above rule because it affords a remedy to past discrimination. (see cases below).

Brown was not pursuing a continuing discrimination complaint. He sued in court 12 days beyond the 30-day limitation from the time the Commission had decided his case against him. On the other hand, Rivera has properly exhausted his administrative remedies thru an open avenue most favorable to him by consolidating all his 1978, 1979 and 1980 claims into a single complaint and then sued in court within the time limitation.

Although the agency was empowered to reject the consolidated complaint or any allegations therein or because it set forth identical matters contained in Rivera's first complaint which was then pending with the agency, it never attempted

to exercise such power as per 29 CFR 1613.215 (*supra*). By way of estoppel, it was too late for the agency to oppose such claims for the first time in the lower court.

Where a plaintiff is not complaining of a discrete act of discrimination, the doctrine of continuing discrimination may except him/her from the strict time requirement of Title VII in order to provide remedy for past actions which operate to discriminate against the complainant at the present time. Olson v. Rembrandt Printing Co., 511 F. 2d 1228, 1234 (8th Cir. 1975). To demonstrate a continuing violation, a plaintiff must show a series of related acts, one or more of which falls within the limitations period. Valentino v. U.S. Postal Service, 674 F.2d 56 (D.C. Cir. 1982). The complainant must allege a present effect of past discrimination. United Air Lines v. Evans, 431 U.S. 153 (1977).

U.S. 553 (1977).

Rivera is not complaining of a discrete act of discrimination. Records show that he has been repeatedly rejected for promotion to EEO Investigator three times and supervisor four times all from 1977 to 1980.

Courts held that as long as the plaintiff is alleging non-promotion over a period of time, the discriminatory failure to promote such employee constitutes a continuing violation for purposes of filing a complaint under Title VII. Rich v. Marietta, etc. supra.

The time limitation in filing a complaint is inconsequential in action challenging employer's entire promotion system or continuing discriminatory practices.

Ibid.).

Where employer's promotional policies were found to involved a pattern of practice of discrimination looking at racial and gender employment patterns

minorities into less favorable job positions the effects constituted continuing violation of law and claims related thereto were not barred by failure to have challenged the promotional policies at inception. Patterson v. American Tobacco, supra.

Records show that as of 1980 no employee of Filipino origin has ever been promoted to the kind of position that Rivera had sought. This was never controverted by the Postal agency.

III. The rules of law laid down in Castro v. United States, 775 F. 2d 399 403-404 (1st Cir. 1985); Purtill v. Harris, 658 F. 2d 134, 138 (3rd Cir. 1981); and Jordan v. United States, 522 F. 2d 1128, 1132 (8th Cir. 1975), do not apply to this case.

Castro v. U.S. Castro and Diaz sue in court with their Title VII and ADEA claims against the F.D.I.C.. Castro

never contacted an EEO Counselor nor did he file a formal complaint with the FDIC, . . . hence he failed to exhaust his administrative remedies. Diaz has initiated administrative proceedings in his ADEA claim with the MSPB and with the agency's EEO Office. The EEO Office soon cancelled his complaint on account of his appeal with the MSPB which was filed earlier without counselling. Soon thereafter he had withdrawn his MSPB appeal with no indication that he has pursued further administrative relief before he sued in court. The court held that Diaz failed to exhaust his administrative remedies.

Unlike Rivera who is pursuing a continuing discrimination claim, Castro and Diaz were complaining of a single act where they could not escape the strict requirement of Title VII. (Olson, *supra*).

On the other hand, Rivera has

cancelled his Notice of Appeal with the Commission for a lawful cause and that he exhausted his administrative remedies thru an open avenue most favorable to him.

Purtill v. Harris - Purtill sued in court before the Commission took final action on his ADEA complaints, hence he failed to exhaust his administrative remedies in spite of his assertion that 180 days had already lapsed since he initiated administrative proceedings.

Rivera's situation is different. The agency decision was not valid and the Commission never acquired jurisdiction over the case. In fact his 1978 and 1979 claims were already included in his second complaint that had officially passed the proper channels of administrative remedies. The consolidation of all his 1978, 1979 and 1980 claims into a single complaint had nicely simplified the whole proceedings for the benefit of

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all parties concerned as well as the court.

If it is taken for granted that there was a valid agency decision, Rivera's ADEA claim would still survive the fact that the Commission was properly notified before he sued in court as per 29 USCA 633a(d).

Jordan v. U.S. - Jordan's failure to cooperate caused the Commission to cancel his complaint. This was not the case of Rivera as he had properly exhausted his administrative remedies thru an open route most favorable to him. He was not bound per 42 U.S.C. 2000e-16(c) to stay with the Commission for 180 days before he could sue in court.

The unfamiliar decision of the Commission is arbitrary, confescatory and violative of Rivera's right under the Fifth Amendment.

IV. The Postal agency has not met

its burden of proof in articulating legitimate and non-discriminatory reasons for rejecting Rivera to all the positions that he had sought over the years.

EEO Investigator Position - Preponderance of evidence show that Rivera was the only applicant with a combination of Master's Degree in Education and Bachelor of Laws with creditable experiences in supervision, investigation, hearing of complaints, arbitration, and mediation, among others. Rivera's Trial Exhibits Nos. 52 to 52c, USPS Qualification Standards No. 0160, allows the substitution of experience with a degree at a rate of 9 months for every academic year of education up to a maximum of 36 months. With this, Rivera's 36 months of credit experience is more than enough to offset the light to moderate EEO counselling experiences of the candidates who were said to be more qualified than Rivera. The agency

has never articulated any legitimate and non-discriminatory reasons why the selecting officials had given more credit to Postal Service EEO experience than the required skills in investigation and the readiness to assume the role of arbitrator, mediator and hearing officer which Rivera possessed. The agency had not given any reason why Rivera was denied interview in the 1979 and 1980 positions, while he was interviewed for the 1978 vacancy and at a time when he had not as yet filed any complaint against the Postal management.

With the prevailing situation, Rivera is not even required to prove that he was the best qualified applicant for all the positions that he had sought. Wang v. Hoffman, 694 F. 2d 1146 (9th Cir. 1982). If Rivera was not the best qualified applicant (arguendo), at least he was one if not the best deserving

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applicant for promotion in a functional affirmative action program.

Supervisor Position - The Postal agency had not articulated any legitimate and non-discriminatory reasons for the following management actions:

1. Why Rivera was subjected to the so-called 204-B supervisory training when this was not required in the PASS selection procedure (see Appendix H) and then evaluated as not qualified to become a supervisor by the very discriminating officials only after seventy (70) days when the said training was ended and at the time when he had already filed a complaint against the management.

2. The legitimacy of the frequent changes and use of four different supervisory selection procedures in so short a time, 1977-1980, has never been justified by the management. This and the above practices had adverse impact on

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the class that Rivera belongs.

3. There is no concrete evidence to show that the PASS selection procedure was introduced on April 1, 1978. Records show that PASS work-books and answer-sheets were distributed to applicants on April 10, 1978 and successful candidates received their eligibilities only in March and April of 1979. Records also show that Rivera reached his 1½ years of Postal service on April 3, 1978.

4. Granting (*arguendo*) that the PASS selection was introduced on April 1, 1978, which, as claimed by the management also marked the end of the old selection procedure. What must be the reason why such change was made at a time when Rivera needed only a couple of days to complete his 1½ years of service and also considering the fact that this requirement had been reduced to only one year under the PASS selection procedure?

5. Aside from his assets for EEO Investigator, Rivera was the only applicant for supervisor with: (a) a Master's Degree in Education major in Administration and Supervision, (b) three certificates in Postal Management and Customer Service, and (c) with several years of teaching, supervisory and leadership experiences. With these, it sounds ironically oppressive to just brand him as not qualified to become a Postal Supervisor, a position he was well prepared to assume.

In line with the case of Aikens v. U. S. Postal Service, 23 FEP Cases 1142 (1980) Rivera has clearly demonstrated that he was qualified to become a supervisor in view of his education, experiences and Postal achievements.

The use of subjective criteria in the selection system is not enough of itself to violate Title VII, but courts

have expressed concern over the use of subjective criteria when there is evidence that criteria furthered bias or discriminatory classification. (see Wang supra).

Establishing qualification is an employer's prerogative, but an employer may not utilize wholly subjective standards by which to judge its employees' qualifications and then plead lack of qualification when its promotion process is challenged as discriminatory. Lee v. Conecuh County Board of Educ. 634 F. 2d 959. (Ala. 1981).

From the factual situations and legal standards presented, it appears that the agency had no definite and objective criteria in the selection of its employees for promotion. Its practices though neutral on its face have adverse impact on Rivera and his class as evidenced by the statistical disparities in promotion

mentioned ahead. The Postal agency has not justified the legitimacy of its promotional policies and practices that had biased Rivera and deprived him of his employment rights protected by law. The agency's profferred explanation in rejecting Rivera for all the promotions that he had sought are not legitimate and non-discriminatory, hence unworthy of credence. (See Texas Dept. of Community Affairs v. Burdine. 450 US 248 (1981). The agency's reasons are just pretexts to cover-up the discrimination and retaliation that had been perpetrated and perpetuated against Rivera over the years.

V. The lower court ignored to pass judgment on Rivera's claims for promotion to supervisor under the Santa Ana Craft Skills Bank and Computer Mark-Up supervisory selection procedures.

These claims were also tried with

the other claims. Rivera's insistence for a judgment on these claims was ignored by the lower court.

CONCLUSION

For the foregoing reasons petitioner Fortunato C. Rivera most respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

DATED: This 18th day of March, 1988.

Respectfully submitted,



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In Propria Persona



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FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORTUNATO C. RIVERA,
Plaintiff-Appellant,
v.

No. 86-6589
D.C. No.
CV 82-2379-MRP

UNITED STATES POSTAL SERVICE,
Defendant-Appellee.

FORTUNATO C. RIVERA,
Plaintiff-Appellant,
v.

No. 86-6607
D.C. No.
CV-82-5326
OPINION

WILLIAM F. BOLGER, Postmaster
General, UNITED STATES POSTAL
SERVICE,
Defendants-Appellees.

Submitted August 12, 1987*

Filed October 20, 1987

Before: J. Blaine Anderson, Harry Pregerson and
John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Noonan

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

SUMMARY

Administrative Law

Appeal from judgment. Affirmed.

Appellant Rivera in 1978, 1979, and 1980 applied to the Postal Service for promotion. Each time other applicants were selected. He filed an administrative complaint as to his 1979 rejection. He received an adverse ruling. He appealed to the Equal Employment Opportunity Commission (EEOC). Shortly thereafter, he requested the EEOC to "cancel" his notice of appeal and filed suit with the district court. The EEOC upheld the Postal Service. Rivera did not think it necessary to file a new appeal to the district court and relied on his earlier filing. He also made an administrative complaint as to the 1980 rejection. He also sued the Postal Service for failing to promote him in 1978 and in 1979.

[1] Rivera's 1978 claim is barred by failure to exhaust his administrative remedies. [2] Once a party appeals to a statutory agency the appeal must be "exhausted." To withdraw is to fail to exhaust one's remedies.

COUNSEL

Fortunato C. Rivera, Anaheim, California, for the plaintiff-appellant.

James A. Friedman, Washington, D.C., for the defendant-appellee.

OPINION

NOONAN, Circuit Judge:

Fortunato C. Rivera appeals from two district court judgments against him in two separate Title VII and age discrimination cases against the United States Postal Service. We consolidate the cases and affirm the district court.

FACTS

Fortunato C. Rivera is a United States citizen of Filipino ancestry, now 63-years-old. He is the holder of B.S. and M.A. degrees in education and is also a Bachelor of Arts. He has been a part-time college instructor, a government supervisor of private schools, an office supervisor, and a senior clerk. He has three certificates in Postal Management and Customer Service, and was a candidate in the Profile Assessment System for Supervisor. On three separate occasions, in 1978, 1979, and 1980, he applied to the Postal Service for promotion to Equal Employment Opportunity Investigator. Each time other applicants were selected in his place.

Rivera did not file an administrative complaint as to his non-selection in 1978. He did file such a complaint as to his 1979 rejection and after the Postal Service ruled against him, he timely appealed on August 30, 1982 to the Equal Employment Opportunity Commission (EEOC). On October 10, 1982, he wrote the EEOC requesting "cancellation" of his notice of appeal. He then filed suit with the district court. The EEOC, by decision of April 21, 1983, upheld the Postal Service. Rivera did not think it necessary within 30 days to file a new appeal to the district court and relied on his earlier filing. Rivera also made an administrative complaint as to the 1980 rejection and after the complaint was rejected by the Postal Service he timely brought suit in the district court; he also sued the Postal Service for discrimination in failing to promote him in 1978, and in 1979.

In addition, Rivera applied in 1980 for promotion to a supervisory position in the Postal Service and was rejected from the training program. He filed an administrative complaint which was rejected and from this rejection he timely filed suit in the district court.

ANALYSIS

[1] Unfortunately Rivera's 1978 claim is barred by an inexorable rule: failure to exhaust his administrative remedies. 42 U.S.C. § 2000e-16(c). His twin claims for 1980 were tried on the merits to the district court. To overturn the district court, Rivera must show that the court was clearly erroneous in its finding of fact. This showing he has failed to make.

The meat of Rivera's appeal consists of an issue relating to his 1979 case not yet decided by this circuit. He had appealed to the EEOC from the Postal Service's decision. Within two months he had withdrawn this appeal by "cancellation." Did the withdrawal open the way to the district court, a path he might have followed initially if he had not first chosen the EEOC route, or was he bound, per 42 U.S.C. § 2000e-16(c), for 180 days to stay with the EEOC?

[2] The answer to this question is not entirely obvious. Again the path of the law laid out by other circuits is contrary to Rivera's position. The view has been taken that once a party appeals to a statutory agency, board or commission, the appeal must be "exhausted." To withdraw is to abandon one's claim, to fail to exhaust one's remedies. Impatience with the agency does not justify immediate resort to the courts. *See Castro v. United States*, 775 F.2d 399, 403-404 (1st Cir. 1985); *Purtill v. Harris*, 658 F.2d 134, 138 (3rd Cir. 1981); *Jordan v. United States*, 522 F.2d 1128, 1132 (8th Cir. 1975). We think this rule is sound. It means in the 1979 case that Rivera was not free to file in the district court until the EEOC

ruled on April 21, 1983. He then failed to meet the statutory deadline.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

Jan. 11, 1988

FORTUNATO C. RIVERA,

Plaintiff-Appellant,

vs.

UNITED STATES POSTAL
SERVICE,

Defendant-Appellee.

FORTUNATO C. RIVERA,

Plaintiff-Appellant,

vs.

WILLIAM F. BOLGER, Post-
master General, UNITED
STATES POSTAL SERVICE,

Defendants-Appellees.

No. 86-6589

DC# CV 82-2379
MRP

No. 86-6607

DC# CV-82-5326

ORDER

Before: ANDERSON, PREGERSON, AND NOONAN,
Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

'ENTERED'
'Feb 14, 1986'

'FILED'
'Feb 13, 1986'

FORTUNATO C. RIVERA, }
Plaintiff, } CASE NO.
v. } CV 82-5326 MRP
WILLIAM F. BOLGER, Post- }
master General, United } JUDGMENT
States Postal Service, }
Defendant. }

This case came on regularly for trial on May 15, 1984. The plaintiff appeared pro se. The defendant was represented by Ronald K. Silver, Assistant United States Attorney.

The Court having heard the testimony of witnesses and the arguments of counsel, having reviewed all materials and exhibits filed in this case, and having entered its Findings of Fact and Conclusions of Law concurrently herewith.

Appendix C

IT IS ORDERED, ADJUDGED AND DECREED
that judgment shall be entered in favor of
the defendant against the plaintiff.

DATED: February 11, 1986

s/Mariana R. Pfaelzer
t/Mariana R. Pfaelzer
United States District Judge

FINDINGS OF FACT

1. Plaintiff applied for the position of ad hoc EEO investigator with the United States Postal Service in 1978.
2. Plaintiff was not selected for this position.
3. Plaintiff was aware of his right to pursue a complaint of discrimination, but chose not to do so.
4. Plaintiff applied for the position of EEO investigator under Vacancy Announcement No. 328 in 1979.
5. Plaintiff was not selected for this position.
6. Plaintiff filed a formal complaint as a result of his non-selection in 1979.
7. Plaintiff's complaint was denied in a final agency action dated August 16, 1982.
8. Plaintiff timely filed his appeal with the Equal Employment Opportunity Commission ("EEOC") within twenty days of

receipt of the final agency action.

9. Plaintiff applied for the position of EEO investigator under Vacancy Announcement No. 514 in 1980.

10. Plaintiff was not selected for this position.

11. Plaintiff filed a formal complaint as a result of this non-selection.

12. Plaintiff's complaint was denied in a final agency action.

13. Plaintiff timely filed this complaint in the United States District Court on October 14, 1982. At that time, the EEOC was still investigating plaintiff's complaint of discrimination under Vacancy Announcement No. 328.

14. The EEOC reached its decision upholding the United States Postal Service as to Vacancy Announcement No. 328 on April 21, 1983.

15. The plaintiff did not file a new action in the United States District Court

within thirty days of the decision by the EEOC.

16. Victor Okon, Kellsey Minor and Francine Needles served as the selection committee to review all applications under Vacancy Announcement No. 514. It was their responsibility to review the more than 100 applications and to select six names to be forwarded to final selection.

17. The review process consisted of each of the three selectors first reviewing each application and initially eliminating those who were obviously not qualified.

18. After this initial elimination, further selection rounds were made to narrow the number of applicants.

19. The three members of the selection committee were searching for demonstrated ability in writing and communication skills and the ability to

handle EEO type problems.

20. Plaintiff's application survived several rounds and was only rejected near the end of the selection process.

21. The reviewers, although believing plaintiff to be qualified for the job, found that the people chosen for the final round were better qualified for the job.

22. No one of the three reviewers rejected plaintiff's application on the basis of his national origin or age.

23. The testimony of the reviewers was credible.

24. Plaintiff was qualified for the position, but not as well qualified as those persons chosen for the final round.

25. The defendant has articulated a non-discriminatory reason for the failure to select plaintiff for the

position of EEO investigator.

26. Plaintiff has not demonstrated that this non-discriminatory reason was a mere pretext.

27. Any Conclusion of Law deemed to be a Finding of Fact is hereby incorporated into these Findings of Fact.

CONCLUSIONS OF LAW

1. This is an action for employment discrimination brought pursuant to the Civil Rights Act of 1964, as amended 42 U.S.C. S 2000e-16, and the Age Discrimination and Employment Act of 1967, 29 U.S.C. S 622 et seq.

2. Because of plaintiff's failure to file a complaint with respect to his non-selection in 1978 for the position of ad hoc EEO investigator, he has failed to exhaust his administrative remedies and this Court lacks jurisdiction over this issue. 42 U.S.C. S 2000e-16(c);

Brown v. General Services Administration

425 U.S. 820, 96 S. Ct. 1961, 48 L. Ed. 2d 402 (1976).

3. After the United States Postal Service's final agency action denying plaintiff's claim of discrimination, for the position of EEO investigator for Vacancy Announcement No. 328, the plaintiff could either bring an action before the EEOC or the United States District Court. He could not do both simultaneously. Brown v. General Services Administration, supra.

4. By choosing to file with the EEOC, the plaintiff was required to wait 180 days from the date of filing his appeal to the EEOC, if no decision was forthcoming, before he could file his action in the district court. 42 U.S.C. § 2000e-16(c).

5. Therefore, plaintiff's complaint in the district court for discrimination over Vacancy Announcement

No. 514, filed within 180 days of plaintiff's complaint with the EEOC, could not also include the issue of Vacancy Announcement No. 328.

6. Plaintiff's failure to file a new complaint in the district court within thirty days of the EEOC's decision in the case of Vacancy Announcement No. 328 deprives this Court of jurisdiction to decide this issue.

7. Therefore, trial in this matter concerned only the issue of Vacancy No. 514.

8. Plaintiff bears the burden of establishing a prima facie case of discrimination. McDonnell Douglas v. Green 411 U.S. 792, 802 (1973).

9. In order to establish a prima facie case, the plaintiff must establish that (1) he belongs to a protected class; (2) that he applied for and was qualified for a position for which the

employer was seeking applicants; (3) despite his qualifications, plaintiff was rejected; and (4) after plaintiff's rejection, the position either remained open or was filled by a person outside the protected class. Once plaintiff has established this *prima facie* case, the burden then shifts to the defendant to demonstrate that the failure to hire plaintiff was for a non-discriminatory reason. If the defendant establishes its burden, the burden then shifts once more to the plaintiff to demonstrate that the defendant's reason was merely a pretest. McDonnell Douglas v. Green 411 U.S. 792, 802 (1973).

10. The defendant has demonstrated that the plaintiff's failure to be selected for the EEO Investigator position was for non-discriminatory reasons.

11. Any Finding of Fact deemed to

be a Conclusion of Law is hereby incorporated into these Conclusions of Law.

DATED February 11, 1986

s/Mariana R. Pfaelzer
t/Mariana R. Pfaelzer
United States District Judge

FORTUNATO C. RIVERA
11621 NEARING DRIVE
ANAHEIM, CALIFORNIA 92804
TELEPHONE: (714) 636-7785

IN PROPRIA PERSONA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FORTUNATO C. RIVERA,	NO. CV
Plaintiff,	82-5326 MRP (Gx)
v.	<u>NOTICE OF MOTION</u>
WILLIAM F. BOLGER, Post-	<u>TION: AND MO-</u>
master General, United	<u>TION TO AMEND</u>
States Postal Service,	<u>FINDINGS OF</u>
Defendant.	<u>FACT AND JUDG-</u>
	<u>MENT</u>

Date: March 24, 1986

Time: 10:00 A. M.

NOTICE OF MOTION

To the Defendant and his Attorneys of

Record:

ROBERT C. BOONER, United States Attorney
FREDERICK M. BROSIO, JR., Asst. US Atty.
Chief, Civil Division

RONALD K. SILVER, Assistant U.S. Attorney
1100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012

Greetings:

PLEASE TAKE NOTICE that on the date and time set forth above, the Plaintiff will bring on for hearing the following Motion to Amend Findings of Fact and Judgment before the Honorable Mariana R. Pfaelzer, United States District Judge at Room 15, United States District Court-house, 312 North Spring Street, Los Angeles, California 90012.

MOTION TO AMEND FINDINGS
OF FACT AND JUDGMENT

Pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure, Plaintiff hereby most respectfully moves this Court to amend its Findings of Fact and the corresponding Judgment in order to correct the errors which are so adverse to him.

This motion is based and supported by the following Memorandum of Points and Authorities as well as the entire case file.

MEMORANDUM OF POINTS AND AUTHORITIES

1. The Judgment and Findings of Fact which appear to have been filed and entered on February 13 and 14, 1986, respectively, were received by the Plaintiff without the corresponding notice of entry and certificate of mailing on February 21, 1986, in the afternoon. The Plaintiff has no way of knowing when they were mailed by the Clerk of Court.

2. There is no issue that the Plaintiff belongs to a protected group, all as to age (now 62), race (oriental brown) and national origin (Philippines).

3. There is also no issue that he applied and was found to be qualified for the position of EEO Investigator by the committee of the Postal agency.

4. Likewise, there is no issue that he was rejected for the positions that he had sought and that other applicants not belonging to his age and minority groups were selected instead of him.

5. The Findings of Fact and Judgment has brought about the following issues to be resolved, *inter alia*:

a) Whether the Plaintiff has properly exhausted his administrative remedies by consolidating his 1978, 1979 and 1980 claims into a single complaint filed in the United States District Court on October 14, 1982;

b) Whether the Plaintiff is less qualified than the other candidates who were selected for the positions that he had sought; and

c) Whether the Plaintiff bears the burden of proving that he is more qualified for the job than the candidates who were selected.

6. The Findings of Fact and Judgment sought to be amended or altered failed to note the following factual circumstances and legal standards justifying the proper exercise of administrative remedies:

- a) Plaintiff did not file a complaint upon his rejection for Ad-Hoc EEO Investigator in 1978 because the EEO Branch Manager of the Postal agency advised him to continue applying for future vacancies which the Plaintiff did at a later date.
- b) Plaintiff did not waive his right to file a discrimination complaint. He knew that a continuing act of discrimination could be pursued at a later date without any lapse of time.
- c) In the case of Rich v. Martin Marietta Corp. 522 F 2d 333, 348, 11 FEP Cases 211 (10th Cir. 1975), reiterated in Higgins v. State of Oklahoma, 25 FEP

Cases 371, 372 (10th Cir. 1981) the Court held that so long as the Plaintiff is alleging non-promotion for a period of time, the discriminatory failure to promote such employee constitutes a continuing violation for purposes of filing a complaint under Title VII of the Civil Rights Act of 1964, as amended.

d) Where employer's promotional policies were found to involved a pattern or practice of discrimination locking minority and women employees into less favorable job positions the effect constituted continuing violation of law and claims related to those violations were not barred by failure to have challenged the promotional policies at inception.

Patterson v. American Tobacco Co., C.A.
Va. 1980, 634 F. 2d 744. 42 U.S. 2000e-2 170.

e) The doctrine laid down in an earlier case of Brown v. General Services Administration, 425 US 820, 96 S. Ct. 1895, 1961 (1976), is not applicable to this case because there existed no continuing act of discrimination. Brown was not claiming failure to get a promotion for a period of time. It was only an isolated single act of discrimination. The Rich, Higgins and Patterson doctrine supra prevails over this case.

f) Plaintiff's administrative complaint consolidating his 1978, 1979 and 1980 claims filed on May 18, 1981, was acknowledged by the management on May 26 1981, with the specific advice that if it is accepted it will be investigated; if it is rejected in whole or in part, the Plaintiff will be advised of his appeals rights in accordance with the provisions of 29 Code of Federal Regulations, Sec. 1613.215.

g) On October 9, 1981, the EEO Branch accepted only a part or segment (the 1980 claim) of the same complaint for investigation. It never rejected the 1978 and 1979 claims. Therefore, they were deemed accepted.

h) The Plaintiff strongly protested against the way the Western Regional EEO Branch was handling his complaints.

i) On December 22, 1981, the Postal Service Headquarters Office of EEO in Washington, D.C., found that the processing of Plaintiff's complaints was a jurisdictional-procedural error. Accordingly, it immediately assumed jurisdiction over the two complaints of the Plaintiff, the first being that of Vacancy No. 328 which included issues of the 1978 claim.

j) Plaintiff requested that the investigative report on his first complaint be vacated because the investigation and processing was not authorized by Postal

regulations, but the same request was ignored for no reasons.

k) Likewise, Plaintiff requested for the full investigation of his second complaint containing his 1978, 1979 and 1980 claims, but the same request was also ignored for no reasons.

l) The Postal Agency did not investigate all aspects of both complaints which could have included a thorough review of the circumstances under which the alleged discrimination occurred and also the policies and practices which might have constituted or appeared to constitute discrimination even if they have not been expressly cited in the complaints as provided by 29 CFR 1613.216.

m) On both cases, the Postal Agency did not make a determination of all the issues brought by the Plaintiff.

n) After two years and four months from the filing of the first complaint

(vacancy 320), the Postal Agency rendered its final decision on August 16, 1982.

o) Plaintiff was then forced to file his Notice of Appeal on August 30, 1982, with the Office of Review and Appeals, EEOC, with the request that he be allowed to file his Appeal Brief at such time as his second consolidated complaint could be finally decided by the Postal Agency.

p) Plaintiff's appeal to the Office of Review and Appeals was never perfected as he never filed his Appeal Brief. Furthermore, Plaintiff requested the cancellation of the Notice of Appeal on October 10, 1982, as he was then determined to file his consolidated complaint on October 14, 1982.

q) In spite of the above, the Office of Review and Appeals, EEOC, rendered its decision against the will of the Plaintiff on April 11, 1983.

r) In view of the failure of the Postal Agency to look into all the Plaintiff's allegations in his complaints coupled by its failure to make a determination of all issues presented, there could have never been a final decision by the Postal Agency to speak of. (29 CFR 1613.233 & 1613.281). Consequently, the Plaintiff could not have been forced to file his Notice of Appeal with the Office of Review and Appeals, EEOC.

s) Assuming arguendo that there was a valid final decision by the Postal Agency, the Office of Review and Appeals could not have competently and validly rendered its decision on a mere Notice of Appeal. Further more, the same notice has been cancelled by the Plaintiff. It could have been different if the appeal was perfected because then the EEOC may proceed with the processing of the appeal even if it has already been abandoned.

(29 CFR 1613.513). Therefore, the EEOC decision against the Plaintiff is non-existent, invalid.

t) The act of filing of a notice of appeal and the invalid decision that followed had never changed the status of Plaintiff's first complaint (vacancy 328). It remained to be a complaint that has not been decided by the Postal Agency after one hundred and eighty (180) days from the date of filing and therefore was an appropriate subject matter of a civil suit in a Federal Court. The Postal Agency has failed to articulate any legitimate non-discriminatory and non-retaliatory reasons to justify the propriety of rendering a so-called "Final Decision" that does not comply with the mandates of the Code of Federal Regulations (Supra).

COMPARATIVE QUALIFICATION OF CANDIDATES

1. Among his other qualifications, the Plaintiff is a holder of a Four-Year

B.S. In Education Degree, a Four-Year Law Degree and a Graduate Degree in Education (MA) and with several years of clerical, teaching, supervisory, investigation, arbitration, and hearing experiences, aside from his years of Postal Service experiences and training achievements in Postal Management and Customer Service.

2. The Postal management selected 3 applicants for the position of Ad-Hoc EEO Investigator in 1978, 12 applicants for Position No. 328 in 1979 and 2 applicants for Position No. 514 in 1980. None of them possessed the same formal education and allied experiences like the Plaintiff, yet the announcements for the same positions show that additional advantage if not preference should be given to one with investigation, arbitration and hearing experiences.

3. There were several applicants

not belonging to Plaintiff's age and minority groups and who were less qualified than the Plaintiff, yet were interviewed for Positions Nos. 328 and 514. The Defendant has not articulated any legitimate and non-discriminatory reason for this action.

4. Since the selection committee found the Plaintiff to be fully qualified, there could have been no reason other than discrimination and reprisal why he was not called for interview for the same positions.

5. The selection procedure used was entirely subjective and impermissible as it has an adverse or disparate impact to the plaintiff and other applicants similarly situated.

6. Use of subjective criteria in selection system is not enough of itself to violate Title VII, but courts have expressed concern over the use of subjective

criteria when there is evidence that criteria furthered bias or discriminatory classification. Wang v. Hoffman, 694 F. 2d 1146. (Dec. 1982).

7. Establishing qualification is an employer's prerogative, but an employer may not utilize wholly subjective standards by which to judge its employees' qualifications and then plead lack of qualification when its promotion process is challenged as discriminatory. Lee v. Connecuh County Board of Education. 634 F. 2d 959, Ala. 1981.

DISPARATE IMPACT THEORY

1. Disparate impact claim challenges practice neutral on its face, but having more adverse impact on minorities than others. Wang, supra; Civil Rights Act of 1964, 701 et seq; 42 USCA 2000e et seq.

2. In making claim that promotion policy had adverse or disparate impact

on minorities, plaintiff has initial burden of proving that selection process resulted in significantly discriminatory pattern for promotions and, in order to prevail on this theory, plaintiff need only demonstrate lack of objective criteria and disparity in job promotion. (Ibid).

3. Once employment discrimination plaintiff establish prima facie case of disparate impact, burden of proof shifts to the employer to prove either that plaintiff's statistics are inaccurate and no disparity exists, or that practice is necessary to efficient operation of the business. (Ibid)

4. Employment discrimination plaintiff claiming disparate impact of employer's promotion policy was not required to prove that he would have been most qualified individual for jobs, nor was he required to prove discriminatory intent on the part of the employer (Ibid).

5. Employment discrimination plaintiff challenging legitimacy of promotion system could not be required to prove that he qualified for promotions under system that he alleged to be discriminatory where legitimacy of that system was not first established. (Ibid).

PLAINTIFF'S BURDEN OF PROOF

1. Under the foregoing legal doctrine, the Plaintiff is not required to prove that he was the best or one of the best candidates for the EEO Investigator positions that he had sought.

2. Therefore, the Defendant's contention that the Plaintiff was not one among the best qualified applicants for the positions that he had sought is not the true reason for his rejection. It is not legitimate and non-discriminatory, hence it is impermissible. It is not the true reason for rejecting the Plaintiff, but is just a pretext to cover-up

the discrimination and retaliation against him for the many EEO complaints that he has filed against the Postal Service.

3. Likewise, he is not required to prove discriminatory intent on the part of the management. The law is result oriented. Therefore, the bare statements of the members of the selecting or reviewing committee that age and national origin were not factors for non-selecting the Plaintiff is not true. It is also a pretext to cover-up the discrimination and retaliation against the Plaintiff. It has also biased him and violated his civil rights protected by law.

4. The Defendant has not articulated any reason to justify the existence of disparity in job promotion.

5. Statistical figures show that for a period of time from 1978 to 1980, Orientals with whom the Plaintiff belongs

got only one promotion to level 15 and above for every 102 employees of their group as compared - (1) to whites who got one promotion for every 12 white employees, (2) to Spanish surnamed who got one promotion for every 17 employees of their group, (3) to Negros who got one promotion for every 15 negro employees, and (4) to American Indian who got one promotion for every 10 employees of their group. (PS Forms 1789 EEO Program for Progress Report for 13 states, Western Region.

CONCLUSION

In view of the foregoing factual circumstances and legal standards, the Defendant could not prevail in this case. The Plaintiff has demonstrated by preponderance of evidence that he was not less qualified than the comparable applicants who were selected for interview and those who were selected for all the positions

that he had sought. Likewise, he has also proved that, were it not for the discrimination and reprisal he could have been promoted to the positions that he has sought. That other then discrimination because of age and national origin as well as retaliation because of the several EEO complaints that he has filed against the Postal Service there could have been no reason why Plaintiff did not get a promotion to the positions that he has sought.

WHEREFORE, it is most respectfully prayed unto this Court that the Findings of Fact be amended or additional findings be made and that the judgment be altered in favor of the Plaintiff.

Dated: This 24th day of February
1986.

Respectfully submitted:

s/ Fortunato C. Rivera
t/FORTUNATO C. RIVERA
Plaintiff, In Pro Per

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

'ENTERED 'Feb 14, 1986'	'FILED 'Feb 13, 1986'
FORTUNATO C. RIVERA,)
	Plaintiff,
v.) CASE NO.
WILLIAM F. BOLGER, Post-) CV 82-2379 MRP
master General, United)
States Postal Service,	JUDGMENT
)
Defendant.)

This case came on regularly for trial on May 15, 1984. The plaintiff appeared pro se. The defendant was represented by Ronald K. Silver, Assistant United States Attorney.

The Court having heard the testimony of witnesses and the arguments of counsel, having reviewed all materials and exhibits filed in this case, and having entered its Findings of Fact and Conclusions of Law concurrently herewith,

IT IS ORDERED, ADJUDGED AND DECREED
that judgment shall be entered in favor
of the defendant against the plaintiff.

DATED: February 11, 1986.

s/Mariana R. Pfaelzer
t/Mariana R. Pfaelzer
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
Feb 13, 1986

FORTUNATO C. RIVERA, } CASE NO.
Plaintiff, } CV 82-2379 MRP
v. } FINDINGS OF FACT
WILLIAM F. BOLGER, Post- } AND CONCLUSIONS
master General, United } OF LAW
States Postal Service }

This case came on regularly for trial on May 15, 1984. The plaintiff appeared pro se. The defendant was represented by Ronald K. Silver, Assistant United States Attorney.

After hearing the testimony of witnesses and the arguments of counsel, and after reviewing all materials and exhibits filed in this case, as well as plaintiff's Objections to the Findings of Fact and Conclusions of Law Prepared by the Defendant, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff, Fortunato C. Rivera, is an American citizen of Filipino origin and an Oriental. He was over the age of 40 years when the events of which he complains took place.
2. The plaintiff is an employee of the United States Postal Service.
3. The plaintiff attempted to become a supervisor under the promotional system which was in effect prior to institution of the Profile Assistance System for Supervisors ("PASS"). However, it was a requirement that an employee have 1-1/2 years of postal service experience in order to be eligible for promotion. The promotional system was replaced nationwide by PASS on April 1, 1978. As of that date, the plaintiff had not yet had one and one-half years of postal service experience and was therefore not qualified for promotion under the old system.

4. The plaintiff then attempted to gain promotion under PASS. The plaintiff was found to be highly qualified to enter into the training program.

5. The plaintiff had to undergo supervisory training as part of the requirements for promotion. This was called 204B Supervisory Training. During this training period in 1980, the plaintiff was evaluated by Lynn White, Ralph Johnston and Steve Bannister. Lynn White, who was the principal supervisor of plaintiff's training, found that plaintiff was unable to appreciate the value of or necessity for paperwork. He found that plaintiff could not master the color coding system that the Postal Service used at the Santa Ana facility, and he assigned someone to help plaintiff. Even with this assistance, plaintiff was unable to adequately perform his job. Mr. White also found that plaintiff had difficulty

in communicating with those employees under his supervision. He also testified as to an incident where plaintiff became involved in an argument with a customer during a lobby call. For these reasons, Mr. White decided that plaintiff was not qualified to become a supervisor.

6. Ralph Johnston also observed the difficulty that plaintiff had with mastering the color coding of the mails and his difficulty in communicating with the employees under his supervision. Mr. Johnston determined that plaintiff was not qualified to become a supervisor.

7. In determining that plaintiff was not qualified for the position of supervisor, Mr. Bannister relied principally on the observations of Mr. White and Mr. Johnston. However, he also took into consideration his own observations of plaintiff in determining that plaintiff was not qualified for the position of

supervisor.

8. As a result of the evaluations of Messers. White, Johnston and Bannister, plaintiff was denied promotion to a supervisory position. These evaluations were made honestly, fairly and without discriminatory motive on the part of messrs. White, Johnston and Bannister.

9. These witnesses all testified that they did not consider Mr. Rivera's national origin or age as factors in deciding whether he was qualified for the position of supervisor. Their testimony was credible.

10. Plaintiff was not qualified for the position of supervisor and he was not denied the position of supervisor on the basis of his age or national origin.

11. Any Conclusion of Law deemed to be a Finding of Fact is hereby incorporated into these Findings of Fact.

CONCLUSIONS OF LAW

1. This is an action brought pursuant to the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 622 et seq.

2. Plaintiff bears the burden of establishing a prima facie case of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

3. In order to establish a prima facie case, the plaintiff must show that (1) he belongs to a protected class; (2) he applied for and was qualified for a position for which the employer was seeking applicants; (3) despite his qualifications, plaintiff was rejected; and (4) after plaintiff's rejection, the position either remained open or was filled by a person outside of the protected class. If plaintiff can demonstrate a prima facie case, the burden then shifts to defendant

to show that plain was rejected for some non-discriminatory reason. If the defendant meets this burden, then the burden shifts back to the plaintiff to establish that the defendant's reason is a mere pretext. McDonnell Douglas Corp. v. Green, supra.

4. The plaintiff has failed to establish that he was qualified for the supervisory position he sought. In addition, the defendant has demonstrated that the plaintiff's failure to be promoted to a supervisory position was for non-discriminatory reasons.

5. Any Findings of Fact deemed to be a Conclusion of Law is hereby incorporated into these Conclusions of Law.

DATED: February 11, 1986

s/Mariana R. Pfaelzer
t/Mariana R. Pfaelzer
United States District Judge

FORTUNATO C. RIVERA
11621 NEARING DRIVE
ANAHEIM, CALIFORNIA 92804
TELEPHONE: (714) 636-7785

IN PROPRIA PERSONA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FORTUNATO C. RIVERA,) NO. CV
Plaintiff, } 82-2379 MRP (Gx)
v.) NOTICE OF MOTION;
WILLIAM F. BOLGER, POST-) AND MOTION TO
MASTER GENERAL, UNITED) AMEND FINDINGS
STATES POSTAL SERVICE,)
Defendant.) OF FACT AND

JUDGMENT

Date: March 17, 1986

Time: 10:00 A.M.

NOTICE OF MOTION

To the Defendant and his Attorneys of
Record:

ROBERT C. BOONER, United States Attorney
FREDERICK M. BROSIO, JR, Asst. US Atty.
Chief, Civil Division
RONALD K. SILVER, Asst. US Attorney
1100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012

Greetings:

PLEASE TAKE NOTICE that on the date and time set forth above, the Plaintiff will bring on for hearing the following Motion to Amend Findings of Fact and Judgment before the Honorable Mariana R. Pfaelzer, United States District Judge, at Room 15, United States District Court, 312 North Spring Street, Los Angeles, California 90012.

MOTION TO AMEND FINDINGS OF FACT
AND JUDGMENT

Pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure, Plaintiff hereby most respectfully moves this Court to amend its Findings of Fact and the corresponding Judgment in order to correct the errors which are so adverse to him.

This motion is based and supported by the following Memorandum of Points and Authorities as well as the

accompanying Amended Complaint of the Plaintiff and the entire case file. (The same complaint is attached as "Annex A").

MEMORANDUM OF POINTS AND AUTHORITIES

I. The Judgment and Findings of Fact which were received by the Plaintiff on February 15, 1986, were erroneous for the following reasons, inter alia:

1. The case file bears the fact that the Plaintiff had applied for promotion under four (4) selection procedures from 1977 to 1980. (Pls see Annex A) They are:

- (1) The Santa Ana Craft Skills Bank procedure in 1977;
- (2) The old system of promotion (Re: inclusion in a Supervisory Register) also in 1977;
- (3) The system used in the selection of Supervisor Computer Mark-up in 1980; and

(4) The PASS selection procedure earlier in 1978 (to 1980).

2. This Court made Findings of Fact only on the old system of promotion and the PASS procedures. It failed to make its Findings of Fact on the Santa Ana Skills Bank procedures and the system used in the selection of Supervisor Computer Mark-Up which did not require 204-B supervisory training and where the Plaintiff had fully qualified, but was rejected in favor of Mr. Leroy Correa, a less qualified candidate not belonging to Plaintiff's age and minority groups.

3. This Court failed to appreciate the credibility and probative value of Plaintiff's trial Exhibit No. 11. This is a letter dated September 29, 1982, from the Postal management advising the Plaintiff that he had already met "the requirement of the Western Regional PASS Training Program in effect in 1980"

which means that he had already qualified for the position of supervisor under the PASS procedures as of that date. This entirely vitiates the self-serving testimonies of the very discriminating officials of the Defendant. (Copy of the same exhibit is attached as "Annex B").

4. The Court also failed to appreciate the credibility and probative value of Plaintiff's trial Exhibit No. 71 which is Part II of the Profile Assessment System for Supervisors (PASS) and the very document that outlines the PASS selection procedures. Under this procedure, it is the review board and advisory panel who determine the qualification of a supervisory candidate, not the persons of Messrs. White, Johnston and Bannister who all testified during the trial that they did not have specific training to train supervisory candidates under the PASS procedures. The same procedures do not require the

supervisory candidates to under-go 204-B training, a management practice that has an adverse impact to the Plaintiff and other candidates equally situated. (Pls see Annex C).

II. Federal Rules of Civil Procedure:

1. Rule 51(b) provides, among other things, that the Court may amend its findings and make additional findings and may amend the judgment accordingly upon motion of a party made not later than 10 days after entry of judgment.

2. Rule 59(e) provides that a motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

III. Employment discrimination
plaintiff challenging legitimacy of promotion system could not be required to prove that he qualified for promotion under system that he alleged to be discriminatory where legitimacy of that system

was not first established. Wang v. Hoff-
man, 694 F. 2nd 1146 (9th Cir. Dec.1982);
Civil Rights Act of 1964, 701 et seq; 42
USCA 2000e et seq.

IV. Under the above legal doctrine Plaintiff is not even required to prove that he had qualified for the positions that he had sought. The case file shows that the Defendant had not justified the legitimacy and frequent changes of the 4 promotional systems used by the Santa Ana MSC (the discriminating Postal Installation) in so short a time which gave an adverse impact to the Plaintiff and other applicants similarly situated. The Defendant had not also justified the practice of requiring supervisory candidates to undergo 204-B training by the Santa Ana MSC when the nation-wide PASS selection procedures had done away with the same system (pls. see Annex C). The use of two systems in the selection of a

Markup and Mail Processing Supervisors,
both requiring the same supervisory
skills has not likewise been justified.

V. CONCLUSION

In view of the foregoing factual
circumstances and legal standards, the
Defendant could not prevail in this case.

WHEREFORE, it is most respectfully
prayed unto this Court that the Findings
of Fact be amended or additional find-
ings be made and that the judgment be
altered in favor of the Plaintiff.

Dated: This 18th day of February,
1986.

Respectfully submitted:

s/ Fortunato C. Rivera
t/ FORTUNATO C. RIVERA
Plaintiff, In Pro Per
11621 Nearing Drive
Anaheim, California 92804
Telephone: (714) 636-7785

UNITED STATES POST OFFICE
Santa Ana, CA 92711

DATE: September 29, 1982

OUR REF: KDW:lb

SUBJECT: Upward Mobility

TO: Fortunato Rivera
11621 Nearing Drive
Anaheim, CA 92804

This letter is in reply to your request dated September 13, 1982 regarding a supervisory detail in Mail Processing. According to our records you have received Phase I General Management Training, and Phase II-On-The-Job (5 weeks), and 204B training. This meets the requirement of the Western Regional PASS Training Program in effect in 1980. However, if you wish continued supervisory details in Mail Processing, it is suggested that you discuss this with

Appendix G

your immediate supervisor and Tour Superintendent, as they make the details and scheduling.

Thank you for your interest in upward mobility.

s/Kirby D. Webb
t/Kirby D. Webb
MSC Director
Employee & Labor Relations

cc: Mgr, Distribution

UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza, SW
Washington, DC 20260

December 22, 1981

Mr. Fortunato C. Rivera
11621 Nearing Drive
Anaheim, CA 92804

Dear Mr. Rivera:

This is in response to your letter of November 18, wherein you complained about the handling of your EEO complaints by the Western Region.

Upon review of the matter it was determined that due to an administrative oversight your complaints on EEO positions were processed by the Western Region Office of EEO rather than by Headquarters Office of EEO. Accordingly, this office is immediately assuming jurisdiction over Case Nos. 5-1-0287-0 and 5-1-0535-1. In this regard, we have further determined that the Western Region's handling of Case No. 5-1-0287-0

Appendix H

has in no way prejudiced its investigation and subsequent proposed disposition. However, upon conclusion of your impending hearing, this office will render the agency's final decision. Your complaint of May 18, Case No. 5-1-0535-1, will be reassigned to a Headquarters' Investigator who will be contacting you, via telephone, when the investigation will commence. I must advise that failure to proceed with this investigation could result in the cancellation of your complaint.

Sincerely,

s/Victor Dunbar
t/Victor Dunbar
General Manager
EEO Appeals Division

Fortunato C. Rivera
11621 Nearing Drive
Anaheim, CA 92804
Phone (714)636-7785

August 30, 1982

The Director
Office of Review and Appeals
Equal Employment Opportunity Commission
2401 E. Street, NW
Washington, DC 20506

NOTICE OF APPEAL

Dear Sir:

This Notice of Appeal is against
the United States Postal Service,
475 L'Enfant Plaza, SW, Washington, DC
20260, in its final decision dated
August 16, 1982, on my old EEO complaint
designated as: Case No. 6-1-5287-0
(a/k/a 5-1-0287-0). I received the
same decision on August 19, 1982.

The same case has been absolved
and became a segment of my other com-
plaint with the same agency designated
as Case No. 6-1-5535-1 (a/k/a 5-1-0535-1).

Appendix I

This later case is concerned with a continuing discriminatory employment practices against me, all for my non-selection to the position of Equal Employment Opportunity Investigator in the Postal Service. It started in 1978 with an AD-HOC Investigator vacancy and ended up with vacancy No. 514 in 1980.

Case No. 6-1-5535-1 (a/k/a 5-1-0535-1) has not as yet been fully investigated in its entirety as an independent complaint embodying a chain of events or successive discriminatory acts constituting a single cause of action.

I have consistently been opposing the piecemeal investigation of this later complaint. I made my stand very clear that should the US Postal Service officials disagree with the legal theories I have propounded in my oppo-

sition letters I would certainly appeal their action to higher authorities.

In view of the foregoing, it is most respectfully requested that I be allowed to file my Appeal Brief at such time as the US Postal Agency could render its final decision on my entire complaint, Case No. 6-1-5535-1 (a/k/a No. 5-1-0535-1).

Very truly yours,

s/Fortunato C. Rivera
t/Fortunato C. Rivera

Copy furnished:

Gen. Manager
EEO Appeals Division
US Postal Service
Washington -DC 20260-4245

11621 Nearing Drive
Anaheim, California 92804

October 10, 1982

The Director
Office of Review and Appeals
EEO Commission
2401 E Street, NW
Washington, DC 20506

Re: Rivera, Fortunato C.
Date: 08-30-82
Agency: USPS-ADM
Agency No.: 6-1-5287-0/5-1-0287-0
Docket No.: 01.82.2278

Dear Sir:

In view of the apparent refusal of the US Postal Service Agency to render its final decision on all the issues I have propounded in Case No. 6-1-5535-1 (a/k/a 5-1-0535-1), I am now being constrained to file a civil suit with the District Court against the United States Postal Service.

Therefore, the filing of an Appeal Brief as mentioned in the last paragraph of my Notice of Appeal dated

Appendix J

August 30, 1982 has now become an impossibility. Cancellation of the same notice, is therefore, requested without prejudice.

Very truly yours,

s/Fortunato C Rivera
t/Fortunato C Rivera
Complainant

Copy furnished: The General Manager
EEO Appeals Division
U.S. Postal Service
475 L'Enfant Plaza, SW
Washington, DC 20260-
4245

PART II

The Profile Assessment System for Supervisors

This Profile Assessment System for Supervisors (PASS) is a method which the US Postal Service has developed for selecting initial level supervisors. A brief explanation of how this system works will help you not only have a better understanding of the system but also feel more comfortable with the process.

First of all, the initial work in developing the process began with interviewing field personnel, (first and second level supervisors) who knew about the specific initial level supervisor job. Working with the Employment and Placement Division of the Employee Relations Department at Headquarters, these supervisors identified job elements that are necessary for initial level supervisor jobs. These "elements"

are based on knowledges, skills, or abilities which can be demonstrated on the job by craft employees. These elements do not represent an exhaustive list of elements necessary for the supervisor's job but do represent those most essential to the supervisor's job. For each element they also developed three statements which describe three levels of work performance. Both, you* and your supervisor will be given a separate, but identical, workbook listing each of these elements. You will be asked to read each element and the three statements following it and decide which statement best describes your job performance. Once you and your supervisor separately have completed these workbooks, each of you will transfer your responses to an answer sheet. The answer sheet will be provided to you when you

return your workbook to your postmaster or other designated person. These answer sheets will be sent by your installation to the National Test Administration Center in Los Angeles where your responses will be compared to your supervisor's responses. Results will be sent to a review board who will review the workbooks and resolve any differences between your responses and your supervisor's responses. The review board will also verify the documentation (examples) given to support your statements.

You will finally be placed into one of three categories: 1) excellent demonstration of ability; 2) good demonstration of ability; 3) some demonstration of ability. A list of candidates in each of these categories will be sent to the local office. When

a vacancy in your office occurs, an advisory panel will meet to recommend three to five best qualified candidates to the Installation Head. The final selection will be made by the Installation Head.

* Here "you" and "your" refer to the candidate.

CIVIL RIGHTS ACT OF 1964, AS AMENDED

42 USCA 2000e-16

Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity -

Sub-paragraph (e) provides:

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

AGE DISCRIMINATION IN EMPLOYMENT
ACT OF 1967, AS AMENDED. 29 USCA 633a

Sub-paragraph (d) provides:

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

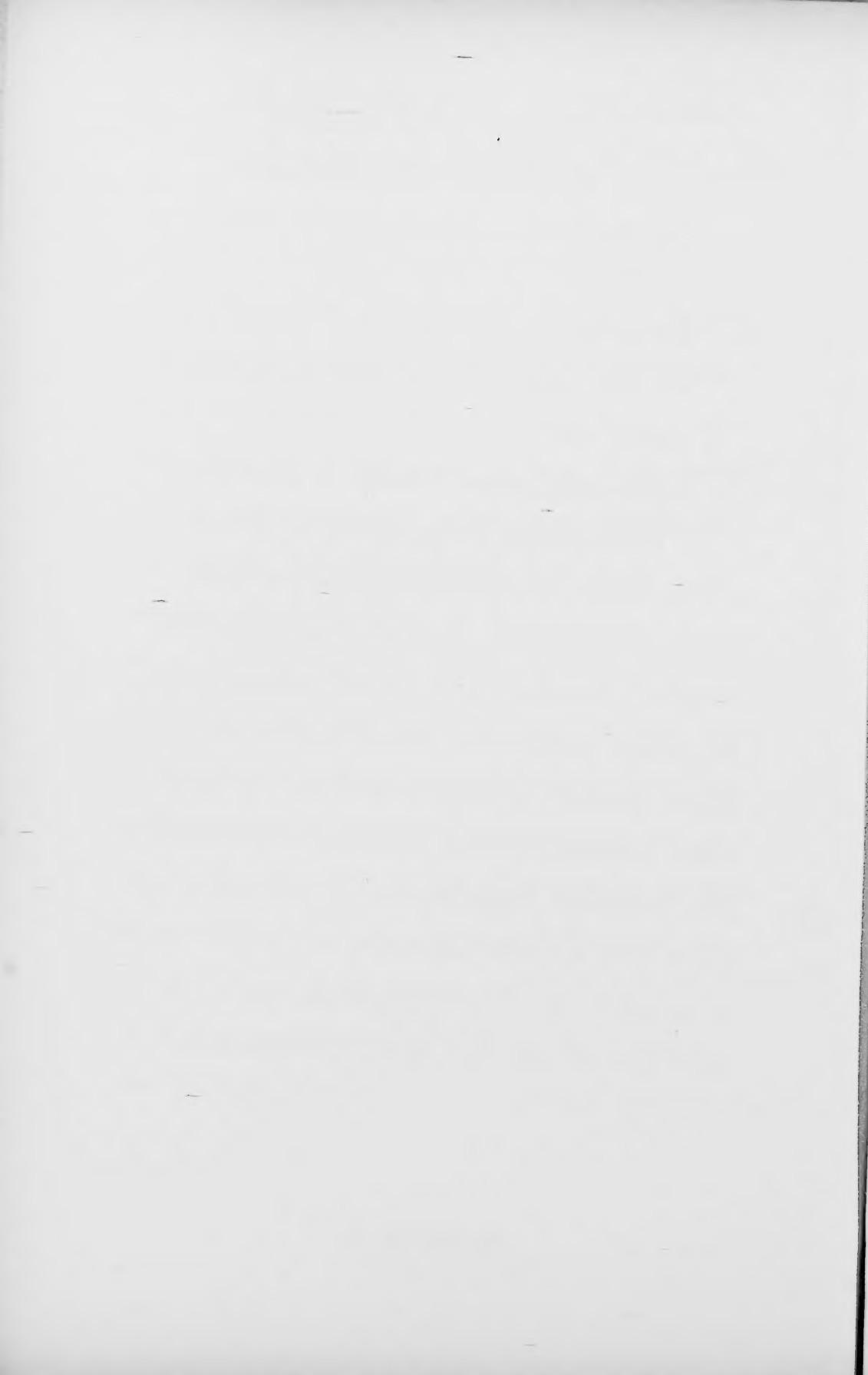
U. S. POSTAL SERVICE

QUALIFICATION STANDARD

P-12A, TL-2, 3-1-78, 0160 (PP. 2-3)

D. EXPERIENCE REQUIREMENTS (Applicable to the position of EEO Investigator Level 19)

Sub-paragraph Number 5 provides: Successful completion of study in a resident school above high school level leading to a degree in directly related fields such as psychology, sociology, personnel management, education, public administration, or business administration may be substituted for general experience at the rate of nine (9) months of experience for each academic year of education, up to a maximum of thirty six (36) months.



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

NO. _____

FORTUNATO C. RIVERA,

Petitioner,

v.

WILLIAM F. BOLGER, Postmaster General
UNITED STATES POSTAL SERVICE,

Respondents.
=====

PROOF OF SERVICE

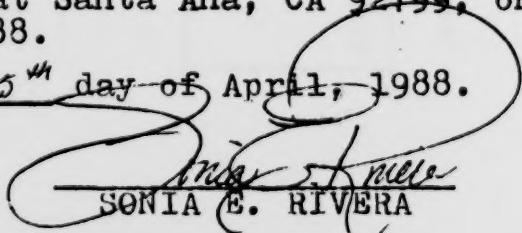
I, Sonia E. Rivera, do hereby declare under penalty of perjury that pursuant to Rule 28.4(a) of this Court, I served copies of the within Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on the Counsels for the Respondents by enclosing copies thereof in two separate envelopes, first class postage prepaid, address to:

The Solicitor General
Department of Justice
Washington, D.C. 20530

Atty. James A. Friedman
Office of Labor Law, USPS
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1133

and depositing the same in the United States mails at Santa Ana, CA 92799, on April 5, 1988.

DATED: This 5th day of April, 1988.


SONIA E. RIVERA

STATE OF CALIFORNIA

COUNTY OF ORANGE

) ss.

On April 5, 1988

before me, the undersigned, a Notary Public in and for
said State, personally appeared Sonia E. Rivera*****

personally known to me (or proved to me on the basis of
satisfactory evidence) to be the person whose name

is subscribed to the within instrument and acknowledged
to me that he/she executed the same.



OFFICIAL SEAL

SCOTT R. THOMAS

Notary Public-California

Principal Office In

Orange County

My Comm. Exp. Jan. 8, 1990

Signature _____

